Testimony of Robert Corn-Revere
on
S. 876, The Children's Protection from Violent Programming Act

Before the
Subcommittee on Communications
Senate Committee on Commerce, Science and Transportation

May 18, 1999

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Mr. Corn-Revere has written extensively on First Amendment, communications and Internet-related issues and is a frequent speaker at professional conferences. He is co-author of a three-volume treatise entitled Modern Communications Law, published by the West Group in 1999, and is editor and coauthor of Rationales and Rationalizations: Regulating the Electronic Media (Media Institute 1997). He is a member of the Editorial Advisory Board of Pike & Fischer's Internet Law & Regulation and the Editorial Board of Commercial Speech Digest. In the past Mr. Corn-Revere worked as a journalist, both for daily newspapers, and for magazines as a freelance writer.

Mr. Corn-Revere received his J.D. from the Columbus School of Law in 1983, where he was Lead Articles Editor of the Catholic University Law Review. He earned an MA from the University of Massachusetts-Amherst in 1980 and a B.A. from Eastern Illinois University in 1977. Mr. Corn-Revere is a member of the District of Columbia Bar, as well as the United States Supreme Court, District of Columbia, Third Fourth and Eleventh Circuit Bars.

Summary

S. 876, the Children's Protection from Violent Programming Act, proposes sweeping restrictions on television programming.

- It would prohibit the distribution of any "violent video programming" on broadcast or cable television channels during hours when children are reasonably likely to be in the audience;

Assuming the FCC adopted the same time channeling approach under S. 876 that it uses to regulate broadcast indecency, the law would ban "violent" programming from 6 a.m. to 10 p.m. -- two-thirds of the broadcast day;

S. 876 would impose this restriction on every television household in the United States in the name of protecting children even though Census Bureau data reveals that no minors reside in two-thirds of American homes. Accordingly, it is significantly overbroad.

The restrictions on speech that would be imposed by S. 876 raise profound First Amendment questions.

- Courts at all levels, from the United States Supreme Court and United States Courts of Appeals, to courts in the various states, have held that violent expression is constitutionally protected. As the Tennessee Supreme Court noted, "every court that has considered the issue has invalidated attempts to regulate materials solely based on violent content, regardless of whether that material is called violence, excess violence, or included within the definition of obscenity";

No court has ever approved the "safe harbor" approach for broadcast indecency upheld in *FCC v. Pacifica Foundation* to violent programming. Doing so would represent a very significant expansion of government authority over television programming that reviewing courts would be most unlikely to approve;

- S. 876 would significantly expand governmental control over other electronic media, such as cable television. Far from supporting this expansion of programming regulation, recent Supreme Court authority holds that such direct control over cable programming would likely be found unconstitutional, and that voluntary measures and technological solutions that foster individual empowerment are constitutionally preferred. *Denver Area Educational Telecommunications Consortium v. FCC.*

Even assuming that social science research has established that some types of programming influence violent behavior, it cannot reliably determine which programs should be censored or help create workable rules.

- After a review of the available scientific literature, Chief Judge Harry Edwards of the United States Court of Appeals for the District of Columbia Circuit wrote that he could not imagine how regulators "can distinguish between harmless and harmful violent speech," and that "no proposal overcomes the lack of supporting

data."

Separating "good" violence from "bad" violence is a highly subjective judgment that cannot be accomplished realistically by imposing "safe harbor" rules. The 1997 UCLA Television Violence Report, for example, noted that if all violence were eliminated, "viewers might never see a historical drama like *Roots*, or such outstanding theatrical films as *Beauty and the Beast*, *The Lion King*, *Forrest Gump* and *Schindler's List*." The National Television Violence Study similarly reported that "not all portrayals of violence are the same." Both reports list myriad factors to explain a preference for some violent programs over others, but to incorporate these theoretical choices into public policy would require micromanagement of program production and would be utterly unworkable.

The exceptions to the violence "safe harbor" in S. 876 help illustrate the subjectivity of the choices that would be made:

♦ The law would empower (but not require) the FCC to exempt news programs from the ban on violent programming. Restricting news coverage, whether it involves local crime, the use of napalm on Vietnam villages or bombing raids in Kosovo, goes to the heart of First Amendment protections. Yet at the same time, at least one researcher from the National Television Violence Study announced research findings that news programs can cause "elevated fears among children" and advocated extending V-chip requirements to cover news broadcasts.

The law also would empower (but not require) the FCC to exempt sporting events from the ban on violent programming. But the socially-sanctioned violence of professional sports conceivably could be a source of the most widespread social effects of all. Children emulate sports stars, and in 1997 there were 14 deaths among high school and middle school football players, and 18 such fatalities in 1996. In addition, in 1996 there were over 360,000 football-related injuries among persons under 25, according to the National Safety Council. Other commentators have pointed out that Super Bowl Sunday may be one of the busiest days of the year at battered women shelters.

• In sum, the programming preferences that would be enshrined in law may have little or nothing to do with the social effects the policy was designed to address.

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Thank you for inviting me to testify about the issue of televised violence and legislative proposals such as S. 876, the "Children's Protection from Violent Programming Act."[12696] I hope that this hearing will be part of a continuing dialogue that will lead to more open discussion of mass media, culture and public policy. It is only through such discussion and debate, rather than through a decision to affirm conclusions already reached, that the most effective policies will emerge. My comments will focus primarily on some of the constitutional ramifications of S. 876.

Although recent events have intensified the focus on media violence, the issue has preoccupied policymakers for much of the 20th Century whether the issue involves cinema, crime novels, comic books or television.[0] In the Telecommunications Act of 1996, Congress addressed concerns about televised violence by adoption of Section 551, which requires the installation of V-chips in new television sets. In 1998, the Federal Communications Commission approved both technical standards for the V-chip, and an industry-created ratings system to be used with the device. The thrust of S. 876, however, is that "technology-based solutions" are not yet universally available and are not sufficient to deal with the

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[12696] The views I am expressing today are my personal views and should not be attributed to any other parties.

[0] *See Report on the Broadcast of Violent, Indecent, and Obscene Material*, 51 F.C.C.2d 418 (1975). The Federal Communications Commission's 1975 report to Congress on violent programming concluded that industry self-regulation should be emphasized over legislation because of First Amendment concerns and the subjective nature of what type of violence is inappropriate. *Id*. at 419-420. The FCC's behind-the-scenes activities in preparation of the report led to adoption by the networks of the "family viewing policy." However, the extent to which the policy was an exercise in "self-regulation" was questioned by the reviewing court and the policy was invalidated. *Writers Guild of America, West v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976), *vacated and remanded on jurisdictional grounds sub nom. Writers Guild of America, West v. ABC*, 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980).

issues raised by televised violence.

Instead of individual viewer empowerment, S. 876 proposes direct regulation of broadcast and cable television programming. Specifically, it would prohibit the distribution to the public of any "violent video programming" during hours when children are reasonably likely to comprise a substantial portion of the audience, and would require the FCC to establish the "safe harbor" hours during which such programming could legally by shown. Assuming the Commission adopted the same time channeling approach that it now uses to restrict broadcast indecency, this would lead to a ban on violent programming between 6 a.m. and 10 p.m. -- two-thirds of the broadcast day. It would impose this restriction on every television home in the United States even though two-thirds of all households in the United States do not have minors residing in them, according to the U.S. Bureau of the Census.[13587]

In short, S. 876 proposes a sweeping restriction on programming. The obvious question that must be addressed is whether such a restriction is consistent with relevant judicial precedents. Some have suggested that the government's constitutional authority to regulate violent speech is indistinguishable from its authority to regulate broadcast indecency under *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) ("*Pacifica*"), or the ability of cable operators to reject indecent leased access programming pursuant to *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996) ("*Denver*"). Such assumptions are unwarranted.

The available case law from a variety of contexts, however, does not support the equivalent treatment of "indecent" and "violent" programming. For its part, the Supreme Court has emphasized the "narrowness" of the *Pacifica* holding on indecency.[0] To add violence to the types of content that could be more intensively regulated would be a significant expansion of the government's ability to control speech. In general, courts have been unwilling to approve the government's authority to regulate violent expression differently from other protected speech. For example, in *Winters v. New York*, the Supreme Court invalidated a state law that curbed the publication of magazines "devoted principally to criminal news and stories of bloodshed, lust or crime." In doing so,

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[13587] Statistical Abstract of the United States 1995, Dept. of Commerce, Econ. & Stats. Admin., Bur. of the Census (115 ed. Sept. 1995).

[0] *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 63, 74 (1983); *See Pacifica*, 438 U.S. at 750.

the Court pointedly stated: "What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."[13861] Similarly the Seventh Circuit has noted that "violence on television . . . is protected speech, however insidious. Any other answer leaves the government in control of all the institutions of culture, the great censor and director of which thoughts are good for us."[0] In another case invalidating restrictions on videotape rentals to minors, the U.S. Court of Appeals for the Eighth Circuit has held that violent video programming is entitled to "the highest degree of First Amendment protection." [14581] Similarly, various courts have rejected tort claims based on violent programming and at least one court expressly declined an invitation to extend *Pacifica* to this area.[0]

Chief Judge Harry Edwards of the United States Court of Appeals for the D.C. Circuit, in an influential law review article, identified many of the serious constitutional questions that would have to be addressed with respect to any regulation of televised violence.[15004] Judge Edwards concluded that there must be full First Amendment protection for violent speech.[0] He noted that the

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[13861] 333 U.S. at 510-11.

[0] *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

[14581] *Video Software Dealer's Association v. Webster*, 968 F.2d 684 (8th Cir. 1992).

[0] *See, e.g., Olivia N. v. National Broadcasting Co.*, 126 Ca. App. 3d 488, 178 Cal. Rptr. 888, 894 (Cal. App. 1st Dist. 1981) (rejecting relevance of *Pacifica* outside the context of "indecent" programming); *Zamora v. Columbia Broadcasting System*, 480 F.Supp 199 (S.D. Fla. 1979).

[15004] *See* Harry T. Edwards and Mitchell N. Berman, *Regulating Violence on Television*, 89 Northwestern U. L. Rev. 1487 (1995). *See also* Patricia M. Wald, *Doing Right by Our Kids: A Case Study in the Perils of Making Policy on Television Violence*, 23 U. Balt. L. Rev. 397 (Spring 1994).

[0] Edwards and Berman, *supra* note 9 at 1524.

constitutional weakness of any scheme to regulate violence turns on the definition that the law uses. Judge Edwards and his co-author concluded that "[w]hen it comes to televised violence, we cannot imagine how regulators can distinguish between harmless and harmful violent speech, and we can find no proposal that overcomes the lack of supporting data."[0] They added: "We cannot imagine how a regulator might fix rules designed to ferret out gratuitous violence without running the risk of wholesale censorship of television programming."[0]

Various courts have borne out Judge Edwards' concern about the ability to fashion a constitutionally defensible definition of "violence." In striking down the Missouri law that prohibited rental of violent video tapes to minors, the United States Court of Appeals for the Eighth Circuit found it "virtually impossible" to determine if the law could be narrowly applied so as to survive constitutional review.[0] Similarly, in other contexts, courts have invalidated restrictions on providing materials depicting "excess violence" to minors on the ground that the laws were unconstitutionally vague. Indeed, the Supreme Court of Tennessee described such a statutory restriction as "entirely subjective."[1] That court also noted that "every court that has considered the issue has invalidated attempts to regulate materials solely based on violent content, regardless of whether that material is called violence, excess violence, or included within the definition of obscenity."[27144]

Similarly, Supreme Court precedent does not support the expansion of the *Pacifica* approach to cable television networks. The case most often cited to justify such expanded governmental authority, *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996), is far from helpful. In that case, the Court struck down two restrictions on indecent programming on cable

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[0] *Id*. at 1565.

[0] *Id*. at 1502 (emphasis in original).

[0] *Video Software Dealer's Association*, 968 F.2d at 689.

[1] *See Davis-Kidd Booksellers, Inc.*, 866 S.W.2d at 532. *See also Allied Artists Pictures Corp. v. Alford*, 410 F. Supp. 1348 (W.D. Tenn. 1976).

[27144] *Davis-Kidd Booksellers, Inc.*, 866 S.W.2d at 531.

leased access channels, while upholding one provision of the law. The rule upheld in *Denver* -- Section 10(a) of the 1992 Cable Act -- merely permitted cable operators to reject indecent programming on leased access channels. Unlike S. 876, Section 10(a) imposed no requirement at all on cable operators to restrict programming.[0] In practical terms, *Denver* approved cable operators' ability to transmit (or not) totally unscrambled indecent programming on leased or public access channels at any time of the day or night. 518 U.S. at 752 (plurality op.). Thus, Section 10(a) expanded cable operators' editorial control over leased access channels because it empowered them for the first time to accept or reject indecent programs on those channels.[0] Moreover, unlike the governmental mandate that would be imposed by S. 876, there is no possibility that the voluntary rules approved in *Denver* would be vague or overly broad, since cable operators themselves were given the authority to define what programming is "indecent."

The difficult constitutional issues presented here also are highlighted by a 1996 decision of the United States Court of Appeals for the District of Columbia Circuit involving the FCC's political broadcasting rules. Although the case did not raise First Amendment issues, it addressed the problem of censorship when safe harbor restrictions are expanded beyond the confines of broadcast "indecency." That case involved an FCC declaratory ruling that permitted broadcasters to channel political advertisements that contained graphic imagery that, in the good faith judgment of the licensees, posed a risk to children.[0] The

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[0] *Denver*, 518 U.S. at 750 (Court approved only permissive controls on indecent leased access programming) (plurality op.); *id*. at 768 (Stevens, J., concurring) ("The difference between § 10(a) and § 10(c) is the difference between a permit and a prohibition."); *id*. at 779 (O'Connor, J., concurring in part and dissenting in part) (Sections 10(a) and 10(c) leave to the cable operator the decision whether or not to broadcast indecent programming.); *id*. at 823 (Thomas, J., concurring in part and dissenting in part) ("The permissive nature of §§ 10(a) and (c) is important in this regard. If Congress had forbidden cable operators to carry indecent programming on leased and public access channels, that law would have burdened the programmer's right . . . to compete for space on an operator's system.") (citation omitted).

[0] *Denver*, 518 U.S. at 743 (plurality op.) (provision involves a complex balance of First Amendment interests).

[0] *Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act*, 9 FCC Rcd. 7638 (1994).

Commission had found that the presentation of graphic abortion imagery in political advertisements "can be psychologically damaging to children" and ruled that broadcasters had discretion to transmit such materials at times when children were less likely to be in the audience. The FCC concluded that such a decision would be reasonable, so long as it was not based on the candidate's political viewpoint and only to the extent the candidate was allowed access at times when "the audience potential is broad enough to meet . . . reasonable access obligations."[0] One United States District Court similarly found that graphic anti-abortion images posed the risk of a negative psychological impact on children, and held that such political advertisements were indecent.[0]

Notwithstanding these findings, the U.S. Court of Appeals for the District of Columbia Circuit held in *Becker v. FCC* that the imperative needs of the young did not outweigh the marginal needs of some candidates. The court concluded that channeling political advertisements violated the "no censorship" provision of Section 315 of the Communications Act. In sharp contrast to the conclusion in the broadcast indecency cases, the court in *Becker* found that "censorship, . . . as commonly understood, connotes any examination of thought or expression in order to prevent discussion of 'objectionable' material."[0] It concluded that restricting programming to the safe harbor hours amounted to being sent to "broadcasting Siberia."[0] It also found that the ability to channel speech would give broadcasters too much power to discriminate between candidates which would exert a chilling effect on speech.[0]

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[0] *Id*.

[0] *Gillett Communications of Atlanta, Inc. v. Becker*, 807 F. Supp. 757, 763 (N.D. Ga. 1992), *appeal dismissed*, 5 F.3d 1500 (11th Cir. 1995).

[0] *Becker v. FCC,* 95 F.3d 75, 82 (D.C. Cir. 1996), quoting *Farmers Educ. & Coop. Union of Am. v. WDAY, Inc.*, 360 U.S. 525, 527 (1959).

[0] *Becker*, 95 F.3d at 80, 84.

[0] *Id*. at 83 ("Not only does the power to channel confer on a licensee the power to discriminate between candidates, it can force one of them to back away from what he considers to be the most effective way of presenting his position on a controversial issue lest he be deprived of the audience he is most anxious to reach."). Although the Commission stressed that it intended to permit licensees no discretion to channel political advertisements on the basis of a candidate's political

The same concerns apply to any measure that would give the government the authority to discriminate between various types of violent programming. This is a particularly pressing concern with measures such as S. 876, since social science research suggests that some portrayals of violence are pro-social, while others are not. But separating "good" violence from "bad" violence is a highly subjective judgment that cannot be accomplished realistically by imposing "safe harbor" rules. The 1997 UCLA Television Violence Report, for example, noted that if all violence were eliminated, "viewers might never see a historical drama like *Roots*, or such outstanding theatrical films as *Beauty and the Beast*, *The Lion King*, *Forrest Gump* and *Schindler's List*." The National Television Violence Study similarly reported that "not all portrayals of violence are the same." Both reports list myriad factors to explain a preference for some violent programs over others, but to incorporate these theoretical choices into public policy would require micromanagement of program production and would be utterly unworkable. As Judge Edwards warned, the factors involved -- "whether violence is presented as justified, effective, unpunished, socially acceptable, gratuitous, realistic (yet fictional), humorous, and motivated by a specific intent to harm" -- create a seemingly "insurmountable obstacle" that the government could "actualize the requisite subtlety into legislation."[0]

It is not necessary to attempt to analyze the complexity of the various factors as they relate to dramatic programming that contains violence. It is sufficient to note that it would be all but impossible to draft a law that would effectively distinguish between *NYPD Blue* and *Walker, Texas Ranger* that would permit one program to be aired and require the other to be banned. The alternative would simply to ban all portrayals of violence, a solution that would destroy the village in order to save it. But it is worth noting that S. 876 attempts to distinguish between pro-social and unacceptable violence on television on a more basic level. It would empower the FCC to exempt from its ban on violent programming those shows that it determines do "not conflict with the objective of protecting children

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position, but only as a response to graphic imagery, *Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act*, 9 FCC Rcd. at 7647-48, the court found that "[i]n many instances . . . it will be impossible to separate the message from the image." *Becker*, 95 F.3d at 81. This statement is difficult to reconcile with the Supreme Court's assurance with respect to "indecent" speech that "[t]here are few, if any, thoughts that cannot be expressed by the use of less offensive language." *Pacifica*, 438 U.S. at 743 n.18.

[0] Edwards and Berman, *supra* note 9, at 1554.

from the negative influences of violent video programming," including "news programs and sporting events."

Such proposed exceptions to the violence "safe harbor" in S. 876 help illustrate the subjectivity of the choices that would be made. The law would empower (but not require) the FCC to exempt news programs from the ban on violent programming. Restricting news coverage, whether it involves local crime, the use of napalm on Vietnam villages or bombing raids in Kosovo, goes to the heart of First Amendment protections. Yet at the same time, at least one researcher from the National Television Violence Study announced research findings that news programs can cause "elevated fears among children" and advocated extending V-chip requirements to cover news broadcasts. Other advocates of a violence safe harbor have suggested that violent news coverage should be subject to regulation.[0]

Similarly, the law also would empower the FCC to exempt sporting events from the ban on violent programming. But the socially-sanctioned violence of professional sports conceivably could be a source of the most widespread social effects of all. Children emulate sports stars, and in 1997 there were 14 deaths among high school and middle school football players, and 18 such fatalities in 1996. In addition, in 1996 there were over 360,000 football-related injuries among persons under 25, according to the National Safety Council.[0] Other commentators have pointed out that Super Bowl Sunday may be one of the busiest days of the year at battered women shelters.[0] One writer for the Daily London Telegraph, citing research from New Zealand that youths who engage in sports are more likely to become delinquent, simply suggested banning sports.[0] The suggestion was no doubt tongue-in-cheek, but it underscores a serious question: Which programming is most closely associated with the suggested harms, and can the distinction be addressed realistically by the law?

It is extremely doubtful that these questions can be answered in a way

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[0] *E.g.*, James T. Hamilton, Channeling Violence 239-284 (1998).

[0] National Safety Council, *Accident Facts* (1998).

[0] Anna Quindlen, *Time to Tackle This*, N.Y. Times, Jan. 17, 1993 at A17.

[0] Theodore Dalrymple, *Is it Time We Banned All Sports?* Daily London Telegraph, December 13, 1996.

that would survive constitutional review.